THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

Russia-Eurasia

KIMBERLY REED, TIMUR BONDARYEV, MARKIAN MALSKYY, YURIY DATSKIV, ANDREY ZELENIN, BORIS MALAKHOV*

I. UKRAINE

As a young, independent country, Ukraine still faces many challenges to its democratic development. Corruption, selective justice, and infringement of rights by government actors are often cited as the main problems of the current legal system. But 2013 brought several positive measures. After numerous declarations and long-term consultations regarding the need for fundamental change in the Ukrainian judicial system, the legislative implementation of judicial reform that started in 2010 continued through 2013.

A. JUDICIAL REFORM

1. *Humanization and Decriminalization of Certain Business Crimes*[1]

The new Law No. 4025-VI abolished criminal liability for certain business crimes no longer deemed to present a public danger, a key feature distinguishing crimes from less severe offenses.[2] Thus, those guilty of the following offenses now face administrative liability (monetary fines) instead of imprisonment:

(a) unauthorized provision of financial services;

(b) conduct of prohibited business activities and/or violation of the prescribed order of business activity;

(c) evading repatriation of foreign currency receipts under contracts with non-residents of Ukraine;

(d) unauthorized opening or use of foreign bank accounts;

---

* Kimberly Reed, Principal, Reed International Law & Consulting LLC, Washington, D.C. & Brussels, Belgium served as committee editor. The following authors submitted contributions: Timur Bondaryev (managing partner), Markian Malskyy (partner), and Yuriy Datskiv (associate), Arzinger Law Office, Kyiv (Ukraine); Andrey Zelenin (partner), Boris Malakhov (associate), Lidings, Moscow (Russian Federation).

1. *See generally* Pro Vnesennya Zmin do Deyakih Zakonodavchih Aktiv Ukraïni Shtodo Gumanizatsiï Vidpovidalynosti za Pravoporushennya u Sferi Gospodarsykoï Diyalynosti [On Amendments to Certain Legislative Acts of Ukraine Concerning the Humanization of Responsibility for Violations in the Sphere of Economic Activity], VOICE OF UKR., Dec. 17, 2011, No. 239, Law No. 4025-VI [hereinafter Economic Activity Law], *available at* http://zakon4.rada.gov.ua/laws/show/4025-17.

2. *See id.* art. 3(1).

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

(e) fraudulent bankruptcy;
(f) fraudulent concealment of insolvency; and
(g) forcing anticompetitive concerted actions.

In addition, Law No. 4025-VI sets forth:

(a) a list of business crimes that can be prosecuted only pursuant to a complaint by the victim (known as "private prosecution crimes"), which has been fully integrated into the new Criminal Procedure Code;[3]
(b) a prohibition on taking into custody anyone suspected or accused of committing a crime punishable by up to five years imprisonment if such person has a clean criminal record (this provision does not apply if the accused obstructs the investigation or otherwise "prevents establishment of the truth");[4] and
(c) allowing courts to impose imprisonment of up to twelve years instead of fines.[5]

The new Criminal Code considerably increased the minimum and maximum amount of a fine—from 30 to 50,000 "tax-free minimum incomes" (TFMI), unless the Criminal Code mandates a higher amount, meaning the minimum fine is thirty times that amount and the maximum is 50,000 times that amount.[6] In 2013, the relevant definition of TFMI was equal to 573.50 UAH, roughly equivalent to U.S. $70.

2. *Reform of Criminal Procedure*

The new Criminal Procedure Code adopted in 2012 replaced the Soviet-era code of 1960, which had been highly criticized for many years as outdated and incompatible with current social mores. The new Code dramatically altered the process of criminal investigation and introduced a "humanization" of criminal justice. The newly adopted Code:

(a) Expands the judiciary's authority to control the rights, freedoms, and interests of persons in the pre-trial stage by introducing an "Office of the Investigating Judge"[7];
(b) Establishes a Uniform Register of Criminal Proceedings, an automated electronic database that will store information on all reported criminal offenses and the progress of the pre-trial investigation.[8] Previously, police and other officials had discretion over whether or not to initiate criminal proceedings, thus offering ample opportunity for collecting bribes for not proceeding. Under the new Code, the registration of a criminal report in the Register automatically triggers the start of the criminal proceedings for that reported offense;
(c) For serious crimes, reduces the maximum duration of a preliminary investigation to twelve months beginning with the notification of the suspect that he/she is under investigation[9];

3. *See generally* Kriminalynij Protsesualynij Kodeks Ukraïni [Code of Criminal Procedure] art. 36, VOICE OF UKR., May 19, 2012, No. 90–91, Law No. 4651-VI, *available at* http://zakon4.rada.gov.ua/laws/show/4651-17.
4. Economic Activity Law, *supra* note 1, art. 1(8).
5. *Id.* art. 3(2).
6. *Id.*
7. Economic Activity Law, *supra* note 1, art. 3.
8. Code of Criminal Procedure, art. 214 (Ukr.).
9. *Id.* art. 219.

(d) Whereas the old code of 1960 listed the rights of defense attorneys separately from their clients, the new Code discards this distinction and makes defense lawyers' rights derivative of the procedural rights of the accused[10];
(e) Explicitly prohibits defense attorneys from taking actions that are inherent to the prosecution, such as detaining persons, applying for temporary seizure of property, and conducting undercover investigations;
(f) Provides for increased numbers of proceedings to be ordered by the investigating judge with the agreement of the prosecutor, which has led to reduced searches, detentions, and court-ordered wiretapping or listening devices;
(g) Increases to over fifty the number of offenses for which criminal proceedings can be initiated only pursuant to a victim's complaint;[11]
(h) Provides for the victim and the accused to reach a settlement deal in private proceedings (victim-instituted) for both minor and serious crimes. Plea bargains can be reached between the accused and the prosecutor in non-private proceedings, especially those for crimes causing damage to state or public interests;[12] and
(i) Institutes a number of important protections for the criminally accused, including:
(1) Alternatives to pre-trial detention, including mandatory release on bail, the amount of which is to be determined by the investigating judge (As a result, the number of petitions for continuing custody filed by prosecutors, and the number of people in detention facilities, have been reduced);[13]
(2) The availability of other alternatives to detention such as house arrest around the clock or only for certain hours of the day;[14] and
(3) The inadmissibility of self-incriminating evidence in a criminal trial.[15]

3. *Reshaping the Bar*

The new Law No. 5076-VI[16] brings Ukraine's regulation of lawyers into line with European norms by creating a unified professional association for attorneys named the National Association of Attorneys of Ukraine (NAAU). This new association is mandatory for all lawyers, rather than voluntary as past bar associations have been, and it is a self-governing, non-profit organization with its own bureaucratic apparatus, somewhat similar to the American Bar Association. From the time that a lawyer is certified for law practice, he or she becomes a member of the NAAU and must pay the mandatory membership fee.[17] Previously existing lawyers' associations continue to operate, resulting in three or four particularly strong Ukrainian bar associations.

10. *Id.* art. 46. This innovation is attributable to the fact that a suspect may either independently lead his own defense or hire a defense lawyer to represent him.
11. *Id.* art. 477.
12. *Id.* art. 36.
13. *Id.* arts. 182, 202.
14. *Id.* art. 181.
15. *Id.* art. 87.
16. Pro Advokaturu ta Advokatsyku Diyalynisty [On Advocacy and Legal Practice], VOICE OF UKR., Aug. 14, 2012, No. 148–49, Law No. 5076-VI [hereinafter Law No. 5076-VI], *available at* http://zakon4.rada.gov.ua/laws/show/5076-17.
17. *Id.* art. 45.

The new Law No. 5076-VI also establishes a Unified Register of Attorneys of Ukraine (the Register) that will maintain information on all Ukraine attorneys, foreign attorneys admitted to practice law in Ukraine, and organized advocacy organizations (law firms or other entities).[18] The Council of Attorneys of Ukraine is the official keeper of the Register. Beginning in 2014, judges and investigators may require mandatory excerpts, sealed and signed by the chairman of the Regional Bar Council, for a lawyer to participate in criminal proceedings as defense counsel.[19] Under the new legislation, the requirements to practice law are set out as follows:

(a) Completion of higher education in law;
(b) Proficiency in the Ukrainian language;
(c) At least two years' work experience in the legal field;
(d) Successful passage of the bar exam;
(e) Completion of an internship (legal training of at least 550 hours);[20]
(f) Taking the attorney's oath; and
(g) Receipt of a certificate for law practice.[21]

The new Law No. 5076-VI also sets out provisions that establish liability for failing to respond to a mandatory lawyer's request.[22] Another important change is the newly detailed regulation of pre-trial discovery and document production, setting a specific time period within which responses to document requests must be provided and mandating administrative liability for failure to provide requested documents or information.[23]

4. *Anti-Corruption Legislation*

Traditionally occupying the bottom of the annual Transparency International Corruption Perceptions Index (CPI), Ukraine has not been very successful in its past efforts to combat corruption. Expectations are strong that Ukraine will improve in the next CPI due to sweeping anti-corruption legislation passed in early 2013, which will take effect on January 1, 2014.

Aiming to bring its law into accord with international standards, Ukraine adopted new punitive measures for corrupt practices.[24] In contrast to certain business crimes being decriminalized (as discussed in Section A.1. above), many corruption offenses were re-criminalized and taken out of the category of administrative fines. Active and passive

18. *Id.* art. 17.

19. *Id.* Ukraine does not distinguish public defenders and legal aid lawyers from other attorneys, and all are subject to the same rules and regulations.

20. Polozˌyennya Pro Organizatziyo Ta Poryadok Prokhodzˌyennya Stazˌoovannya Dlya Otrimannya Osoboyo Svidotztva Pro Pravo Na Zanyattya Advokatsˈkoyo Diyalˈnistyo [Provisions of the Organization and Order of Internships for Receiving the Certificate of Advocacy] art. 1(5) (approved by Council of Attorneys of Ukraine No. 81, Feb. 16, 2013), *available at* http://www.unba.org.ua.

21. Law No. 5076-VI, *supra* note 16, art. 6.

22. *Id.* art. 24.

23. *Id.* art. 6.

24. Pro Vnyesyennya Zmin Do Dyeyakikh Zakonodavchikh Aktiv Ookrayini Shtodo Privyedyennya Natzionalˈnogo Zakonodavstva Oo Vidpovidnistˈ Iz Standartami Kriminalˈnoyi Konvyentziyi Pro Borotˈboo Z Korooptziyeyo [On Amendments to Certain Ukrainian Legislative Acts in Relation to Bringing National Legislation into Accordance with Criminal Law Convention on Corruption Standards], VOICE OF UKR., May 17, 2013, No. 90, Law No. 221-VII [hereinafter Law No. 221-VII], *available at* http://zakon4.rada.gov.ua/laws/show/221-18.

corruption are targeted on the widest possible scale in an attempt to improve the Law "On Grounds of Corruption Prevention and Counteraction,"[25] with improvements being based on observations of the law's past application and effectiveness (or lack thereof). One of the most dramatic changes is the abandonment of the old concept of "bribery" in favor of the more comprehensive "unjust benefit," which includes not only monetary benefits, but also non-monetary preferences, advantages, and benefits (a change fully in line with modern global practices).

The new anti-corruption legislation draws a line between a prohibited "unjustified benefit" and a "gift." Consistent with the generally-recognized concept of hospitality, which is a deeply engrained cultural norm in Ukraine and other Slavic countries, officials may accept personal gifts so long as their value does not exceed certain thresholds established by the law (currently the equivalent of U.S. $75 for a single gift and U.S. $150 for multiple gifts from one person in a single year). Hospitality and entertainment expenses are not expressly addressed, but it is generally assumed that the limit on gifts will apply to these areas too.[26] An interesting new mandate set out in the new anti-corruption framework is the creation of a "Uniform State Register of Corruption Offenses" (the Corruption Register).[27] The Corruption Register is available online at no cost and contains information on individuals found guilty of corruption offenses, including their names, the jobs they held at the time of the offenses, a description of the culpable behavior, and the type of punishment imposed. This is an experiment for Ukraine and it remains to be seen whether it is a workable instrument in combating corruption.

Finally, the new legislation expands the grounds for dismissal for corruption offenses of many categories of officials, including police officers, prosecutors, National Security Service workers, heads of local municipal councils, private notaries, and others.[28]

5. *Enforcement of Judicial Decisions*

A new law aimed at facilitating the state's fulfillment of monetary obligations pursuant to judicial decisions[29] passed in September 2013 as one of the "Euro-integration" laws required to be passed by the Ukrainian parliament prior to signing the Association Agreement with the EU.[30] Under this law, the government shall carry out an audit of all judi-

25. Pro Zasadi Zapobigannya i Protidiyi Korooptziyi [On Grounds of Corruption Prevention and Counteraction] VOICE OF UKR., June 15, 2011, No. 107, Law No. 3206-VI, *available at* http://zakon4.rada.gov.ua/laws/show/3206-17.

26. Law No. 221-VII, *supra* note 24, I(2)(3).

27. Michael A. Tooshi, *Ukraine Update: Anti-Corruption Legislation Amid the Protests*, CORP. COMPLIANCE INSIGHTS (Feb. 7, 2014), http://www.corporatecomplianceinsights.com/ukraine-update-anti-corruption-legislation-amid-the-protests/.

28. Law No. 221-VII, *supra* note 24, I(1)(1).

29. Pro Vnyesyennya Zmin Do Dyeyakikh Zakoniv Ookrayini Shtodo Vikonannya Soodovikh Risheny [On Amendments to Certain Ukrainian Legislative Acts in Relation to Court Decision Enforcement], VOICE OF UKR., Oct. 15, 2013, No. 192, Law No. 583-VII [hereinafter Law No. 583-VII], *available at* http://zakon4.rada.gov.ua/laws/show/583-18.

30. Despite doubts raised at the end of 2013 over Ukraine's continued pursuit of entry into the European Union, the EU has left open for now its invitation to Ukraine to resume accession discussions in the future. *See generally* Pitannya do Ugodi pro Asotsiatsiyu Mizh Ukraïnoyu, z Odnogo Boku, ta Єvropejsykim Soyuzom Єvropejsykoï Atomnoï Energiï Spivtovaristva i Jogo Derzhav-chleniv, z Inshogo Boku [Question about Association Agreement between Ukraine, on the one hand, and the European Union European Atomic

cial decisions under which the state has outstanding monetary liabilities to individuals. It also established the priority of claims and the order of their discharge. First priority claims include liabilities under judgments for pensions, social payments, maintenance and alimony, compensation for damages and losses caused by criminal or administrative offenses, injuries or other health damages, as well as those in connection with the loss of a breadwinner. Second priority claims include liabilities under judgments related to employment relationships, and third priority claims encompass any other liabilities. The amounts of such payments due for discharge will be provided for in each year's annual state budget law. These statutory changes aim to ensure that enforcement of judicial decisions for monetary payments against state bodies, institutes, etc.—whose property cannot be sold to pay off such obligations as a private entity's could be—can be guaranteed.[31] The new law also exempts applicants from having to pay fees for enforcement of writs of execution in cases regarding property confiscation, recovery of recurring payments, seizure of property as security against claims, compensation of costs related to enforcing judgments, recovery of fines, or enforcement of judgments according to the procedure established by the Law "On State Guarantees of Court Decision Enforcement."[32]

6. *Criminal Liability of Legal Entities*[33]

For the first time in Ukrainian history, criminal liability of legal entities for certain crimes was enacted with Law No. 314-VII.[34] Criminal proceedings now may be initiated against a legal entity if an authorized person and/or representative commits one of the following acts for and on behalf of the entity:

(a) Legalization of profit acquired through illegal means (i.e. money laundering);
(b) Use of funds obtained from illegal distribution or sale of drugs, psychotropic substances, poisons, strong medicines, or other regulated substances;
(c) Bribery of an official of another legal entity or a person providing public services (*e.g.*, an auditor, notary, appraiser, arbitrator, etc.); or
(d) Acts of terrorism or financing terrorism.

The above-described acts shall be deemed to be committed for and on behalf of a legal entity if they are aimed at obtaining an illegal benefit for the legal entity or facilitating the obtaining of such a benefit, or if they are aimed at evading any liability stipulated by law. Criminal penalties provided for legal entities are restricted to fines, confiscation of property, or liquidation of the legal entity.[35]

Energy Community and its Member States on the Other Hand] (Resolution of the Cabinet of Ministers of Ukraine No. 905-p) (Nov. 21, 2013) (Ukr.).

31. Law No. 583-VII, *supra* note 29, art. 2.

32. The implementation of these changes has been the subject of a pilot decision of the European Court of Human Rights against Ukraine in the case of Ivanov v. Ukraine, App. No. 15007/02 (2006), *available at* http://hudoc.echr.coe.int.

33. Pro Vnesennya Zmin do Deyakih Zakonodavchih aktiv Ukraïni Shtodo Vikonannya Planu dij Shtodo Liberalizatsiï Єvropejsykim Soyuzom Vizovogo Rezhimu dlya Ukraïni Stosovno Vidpovidalynosti Yuridichnih Osib [On Amendments to Certain Ukrainian Legal Acts (in order to implement EU-Ukraine visa dialogue action plan on visa liberalization regarding liability for legal entities)], VOICE OF UKR., June 22, 2013, No. 116, Law No. 314-VII, *available at* http://zakon4.rada.gov.ua/laws/show/314-vii.

34. *Id.* art. 1.

35. *Id.*

B. Transfer Pricing Reform

Major transfer pricing reform took effect on September 1, 2013, with most new rules based on those of the Organisation for Economic Co-Operation and Development (OECD). According to the newly enacted Law No. 408-VII,[36] "controlled operations" are business transactions for purchasing or selling goods, works, and/or services performed by Ukrainian taxpayers with non-residents of Ukraine, or by Ukrainian taxpayers with Ukrainian residents who did one of the following:

(a) Declared a negative tax base from income taxes for the preceding tax (accounting) year;

(b) Used special tax treatment at the start of the current tax (accounting) year;

(c) Paid corporate income tax and/or value added tax at a rate other than standard (basic) rate stipulated by the Tax Code as for the start of the current tax (accounting) year; or

(d) Did not pay corporate income tax and/or value added tax as for the start of current tax (accounting) year.[37]

Controlled operations also include transactions where one party is a non-resident registered in a state or territory where the corporate income tax rate is at least 5 percent lower than in Ukraine (where the corporate tax rate decreased from 19 percent to 16 percent on January 1, 2014) or who actually pays corporate income tax at a rate at least 5 percent lower than in Ukraine.[38] A list of such states and territories is to be issued regularly by the Cabinet Ministers of Ukraine. Further, to be considered a controlled operation, a second condition must exist; the total transaction volume with each taxpayer's counterparty must equal or exceed fifty million UAH (excluding VAT) for each calendar year.[39]

In connection with the new transfer pricing legislation, the government also enacted a list of legislative acts, which, *inter alia*, stipulate the official information sources to be used to determine an arm's length price and special commercial issues for transfer pricing purposes.[40]

36. Pro Vnyesyennya Zmin Do Podatkovogo Kodyeksoo Ookrayini Shtodo Transfyertnogo Tzinoootvoryennya [On Amendments to the Tax Code of Ukraine in Relation to Transfer Pricing], Voice of Ukr., Aug. 16, 2013, No. 145, Law No. 408-VII [hereinafter Law No. 408-VII], *available at* http://zakon4.rada.gov.ua/laws/show/408-18.

37. Podatkoviy Kodyeks Ookrayini [Tax Code of Ukraine] Voice of Ukr., Dec. 4, 2010, No. 229-30, Law No. 2755-VI, *available at* http://zakon4.rada.gov.ua/laws/show/2755-17.

38. *Id.* art. 39.2.1.2.

39. *Id.* art. 39.2.1.4.

40. Kabinet Ministriv Ukraïni Rozporyadzhennya Pro Zatverdzhennya Pereliku Spetsializovanih Komertsijnih Vidany Dlya Tsilej Transfertnogo Tsinoutvorennya [Resolution of the Cabinet of Ministers on the List of Specialized Business Publications for the Purpose of Transfer Pricing], Official Bulletin of Ukr., Nov. 19, 2013, No. 87, Decree No. 865-p; Kabinet Ministriv Ukraïni Rozporyadzhennya Pro Zatverdzhennya Pereliku Dzherel Informatsiï Pro Rinkovi Tsini Dlya Tsilej Transfertnogo Tsinoutvorennya [Resolution of the Cabinet of Ministers on the List of Sources of Information on Market Prices for the Purpose of Transfer Pricing], Official Bulletin of Ukr., Nov. 19, 2013, No. 87, Decree No. 866-p.

C. Regulation of Settlements

A new regulation of the National Bank of Ukraine imposes restrictions on transactions involving cash settlements,[41] establishing the maximum allowable cash payments on a single day as follows:

(a) Cash settlements between companies may not exceed UAH 10,000 (approximately U.S. $1,250);

(b) Cash settlements between an individual and a company under a contract for the supply of goods, works, and/or services may not exceed UAH 150,000 (approximately U.S. $18,500); and

(c) Cash settlements between individuals under sales contracts requiring a notarial form may not exceed UAH 150,000 (approximately U.S. $18,500).[42]

Violations may result in penalties ranging from UAH 1,700 (approximately U.S. $210) to UAH 3,400 (approximately U.S. $420) being imposed on company officials (e.g., directors, chief accountants). Currently, no penalties for individuals are envisaged, but notaries may refuse to notarize a contract if the limits above have been exceeded.

II. Russian Federation

In 2013, Russian civil law underwent fundamental and extensive changes. The Russian Civil Code was adopted almost twenty years ago. Since then, Russia's political and economic situation changed dramatically, with many new business models and transaction structures being introduced. These developments necessitated the adoption and/or amendment of many Civil Code provisions and related laws. This overview highlights the most significant amendments made in 2013 in business/commercial law, corporate transactions and governance, securities, dispute resolution, and intellectual property.

A. Business/Commercial Law

The first part of the Civil Code amendments,[43] which took effect March 1, 2013, concerns the Code's general provisions. The most discussed and practical amendments concern the adjustment of the bona fide principle and the cancellation of "double registration" of real property.

---

41. Pro Vstanovlyennya Granichnoyi Soomi Rozrakhoonkiv Gotivkoyo [On Establishment of Limit to Payments in Cash], Official Bulletin of Ukr., July 26, 2013, No. 54, Res. No. 210, *available at* http://zakon4.rada.gov.ua/laws/show/z1109-13.

42. *Id.* art. 1 (these restrictions do not apply to settlements by companies with state funds, donations and charitable assistance, and travel allowances).

43. Federalnыj Zakon ot 30.12.2012 N 302-FZ O Vnesenii Izmenenij v Glavы 1, 2, 3 i 4 Chasti Pervoj Grazhdanskogo Kodeksa Rossijskoj Federatsii [Federal Law of December 30, 2012 No. 302-FZ, On Amending Chapters 1, 2, 3 and 4 of the Civil Code of the Russian Federation] Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2012, No. 302 [hereinafter Federal Law of The Russian Federation No. 302-FZ], *available at* http://www.consultant.ru/document/cons_doc_LAW_142950/.

1. *Bona Fide and Abuse of Rights Concepts*

Article 1 of the Civil Code[44] establishes the basic presumption that participants in civil transactions are bona fide actors; that is, they are acting in good faith with respect to the transaction.[45] On one hand, the bona fide principle is intended to guarantee additional protection of other fundamental civil law principles, namely, the freedom of contract and parties' discretion to decide the exact terms of their deal. On the other hand, the inclusion of this principle is an additional basis for an injured party to seek court protection of its violated rights if the injured party proves that a defendant acted in breach of this presumption.[46]

Additionally, the new amendments to Article 10 of the Civil Code[47] render it illegal for a person/company to exercise its civil rights with the express purpose of inflicting damage on another person/company, or exploit loopholes in the law (referred to by the amendments as "acting in avoidance of the law") with an unlawful intent, or to otherwise intentionally abuse the law. Therefore, courts may now use the principle when denying seemingly legitimate claims that were made for illegitimate purposes. For example, in *TSZh Skakovaya 5 v. Artex Corporation*,[48] the Supreme Commercial Court (SCC) recognized that using an offshore scheme to avoid taxation without disclosing its final beneficiary constituted a violation of Article 10.

2. *State Registration of Real Property*

One of the most anticipated amendments to the Civil Code was the cancellation of the "double registration" requirement for certain types of real property transactions. Formerly, it was necessary to register both a property sale agreement and the transfer of the title document with the State Registry. An amendment[49] to Article 8.1 of the Civil Code now mandates that, for contracts for the sale/purchase of real property and the donation of real estate, only the transfer of title must be registered.[50]

The double registration requirement still applies to leases, however. The legislature initially decided to abolish the requirement for lease contracts starting March 1, 2013,[51] but under pressure from the business community, which was concerned about the possibility of multiple fraudulent leases of the same premises, the legislature decided three days later to restore the requirement for double registration of lease contracts.[52]

---

44. GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1 (Russ.), *available at* http://www.consultant.ru/popular/gkrf1/.

45. Previously, the Civil Code did not overtly recognize such a presumption.

46. Under previous case law, courts rarely granted claims based solely on the good faith presumption against defendants who acted in bad faith. Now such a breach could constitute, per se, sufficient ground for upholding these claims.

47. Civil Code, art. 10.

48. TSZh Skakovaya 5 v. Artex Corp., Visshyego Arbitrazˌnogo Sooda Rossiyskoy Fyedyeratzii, [Supreme Commercial Court of Russian Federation] 2013, No. 14828/12, *available at* http://kad.arbitr.ru/PdfDocument/d6e33458-2598-4f8b-8c08-6fb982f653cb/A40-82045-2011_20130326_Reshenija%20i%20postanovlenija.pdf.

49. Federal Law of The Russian Federation No. 302-FZ, *supra* note 43.

50. Civil Code, art. 8.1.

51. Federal Law of The Russian Federation No. 302-FZ, *supra* note 43.

52. *Id.*

3. *New Requirements for Invalidating Contracts*

There have been significant amendments to the legal framework for invalidating contracts.[53] Russian civil law practitioners widely recognize that the previous invalidation mechanism gave contracting parties who were acting in bad faith an opportunity to evade their contractual obligations by simply invalidating a contract. The new invalidation mechanism is designed to decrease the potential for this type of abuse. A transaction is now considered void (not just voidable) if it violates a statute or regulation explicitly recognizing invalidation as a consequence of such a violation, or if it contradicts public order (similar to the American concept of "void as against public policy") or the legal interests or rights of third parties.[54] Similarly, a transaction is voidable by court decision if it was obtained by deceit (such as deliberate concealment or non-disclosure of material circumstances known to one party but not the other)[55] or "substantial ignorance" (e.g., gross mistakes regarding the nature or subject matter of the transaction).[56]

The application of the statute of limitations was also changed in order to prevent invalidation of transactions whose performance began long before they were challenged by one of the parties. Accordingly, a three-year statute of limitation for contract invalidation and subsequent restitution starts running when a reasonable person knew, or should have known, that grounds for invalidation exist. The invalidation action must be brought within ten years of the beginning of the contract's performance.[57]

4. *Possible Further Changes to the Civil Code*

It is expected that the Civil Code will be further amended to introduce concepts and institutions heretofore unknown in Russian civil law, such as indemnity and escrow accounts similar to those existing under English law.[58] At the time of this writing a draft of such a law is undergoing its second of three hearings in the Russian Parliament, although it is difficult to predict whether and when it will come into force. It is clear, however, that if adopted, it is intended to make Russian law more flexible and attractive for use in cross-border and internal merger and acquisition transactions.

---

53. Federalnыj Zakon ot 07.05.2013 N 100-FZ O Vnesenii Izmenenij v Podrazdelы 4 i 5 Razdela I Chasti Pervoj i Statyyu 1153 Chasti Tretyej Grazhdanskogo Kodeksa Rossijskoj Federatsii [Federal Law July 5, 2013 No. 100-FZ, On Amending Chapters 1, 2, 3 and 4 of the Civil Code of the Russian Federation] SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation], 2013, No. 100 [hereinafter Federal Law of The Russian Federation No. 100-FZ], *available at* http://www.consultant.ru/document/cons_doc_LAW_145981/.

54. Civil Code, art. 169.

55. *Id.* art. 179.2.

56. *Id.* art. 178.2.

57. *Id.* art. 181.1.

58. Proekt Federalynogo Zakona N 47538-6 O Vnesenii Izmenenij v Chasti Pervuyu, Vtoruyu, Tretyyu i Chetvertuyu Grazhdanskogo Kodeksa Rossijskoj Federatsii, a Takzhe v Otdelynыe Zakonodatelynыe Aktы Rossijskoj Federatsii [Draft Federal Law N 47538-6 On Amendments to the first, second, third, and fourth of the Civil Code of the Russian Federation and Certain Legislative Acts of the Russian Federation], Apr. 27, 2013, Law No. 47538-6 [hereinafter Draft Federal Law N 47538-6], *available at* http://base.garant.ru/58024599/.

B. Corporate Transactions and Governance

Certain legislative amendments pertain to the general corporate law apparatus.[59] Corporate relations were brought formally within the purview of civil law regulation (based on the principle of the parties' discretion to enter into agreements), whereas they had previously been considered part of public law (based on the principle of the state's autonomy to contract, a vestige of the communist era). Consequently, while in the past Russian commercial courts had exclusive jurisdiction over corporate disputes and arbitration of such disputes was prohibited, civil law governance of corporate relations, *inter alia*, enables parties to submit corporate claims to arbitration.[60]

Additionally, the Civil Code was amended by chapter 9.1, which recognizes for the first time the possibility of shareholders' resolutions directly affecting companies' rights and obligations.[61] A shareholders' resolution now may be adopted by a majority of the shareholders meeting participants, so long as the participants represent more than 50 percent of the total outstanding shareholdings. Of course, shareholders' resolutions should always be documented in the form of minutes.[62]

New changes to the Civil Code also introduced the concept of the "joint immovable complex,"[63] an aggregation of jointly functional premises, buildings, and other items which is recognized as a single entity.[64] A premise can attain "joint immovable complex" status when the titles for all of its components have obtained state registration, provided they meet specific criteria, including the inseparable physical or technical connections of all of the components and the location of all the components on a common land plot.

C. Securities

A distinction between securities in certificated and non-certificated forms is a noticeable element in important amendments to the Civil Code pertaining to securities regulation.[65] In particular, the Civil Code now expressly states that certificated securities are considered to be tangible assets, while non-certificated securities are intangible assets.[66]

Certificated securities are documents satisfying formal legal requirements and specifying the rights that should be exercised or transferred upon the holder's demand.[67] The

59. Federal Law of The Russian Federation No. 302-FZ, *supra* note 43.

60. *Id.*

61. Postanovlenie Konstitutsionnogo Suda RF ot 21 Dekabria 2011 g. [Ruling of the Russian Federation Constitutional Court of Dec. 21, 2011], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2011, No. 18-O-O/2011, *available at* http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=ARB;n=248093;dst=0.

62. Draft Federal Law N 47538-6, *supra* note 58, ch. 9.1.

63. Fyedyeral'niy Zakon ot 02.07.2013 N 142-FZ O Vnyesyenii Izmyenyeniy v Podrazdyel 3 Razdyela I Chasti Pyervoy Grazdanskogo Kodyeksa Rossiyskoy Fyedyeratzii [Federal Law of February 7, 2013 N 142-FZ On Amendments to subsection 3 of Section I of the Civil Code of the Russian Federation] Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2013, No. 142 [hereinafter Federal Law of The Russian Federation No. 142-FZ], *available at* http://www.consultant.ru/document/cons_doc_LAW_148454/.

64. Civil Code, art. 1.

65. Federal Law of The Russian Federation No. 142-FZ, *supra* note 63.

66. Civil Code, art. 142–43.

67. *Id.* art. 142.

procedure for enforcing rights attached to certificated securities that have been alienated from the enforcing owner (through loss, theft, or other reasons) has substantially changed and it now falls under general civil "vindication" rules, subject to certain additional requirements, for example:[68]

a) The enforcer must have been a bona fide possessor of the securities before losing/being alienated from them;
b) Securities verifying a monetary claim, as well as securities acquired on a stock exchange, may not be vindicated (taken back) from a bona fide possessor;
c) In the case of a gratuitous acquisition of certificated securities from a person not entitled to dispose of them, a prior possessor has priority over them, even from a subsequent bona fide possessor.

Non-certificated securities, as intangible assets, provide *in personam* rights to their owner/possessor as against their issuer. Any transfer of title to non-certificated securities must comply with specific registration rules[69] including, *inter alia*, that registrar activity regarding non-certificated securities is subject to licensing and may not be performed by any unlicensed third party.[70]

D. Dispute Resolution

In 2013, changes to Russian commercial procedures were primarily aimed at harmonizing laws relating to two dynamically growing spheres, the recognition and enforcement of foreign awards and court decisions and protection of intellectual property rights.

1. *Recognition and Enforcement*

Largely due to ambiguities in Russian law, the recognition of foreign judgments and enforcement of them has long been a murky and highly complicated area. This has caused enormous problems in corporate law because many contracting parties in Russia, particularly foreign companies, prefer to specify that their contracts will be governed by non-Russian law in order to ensure that predictable and well-established legal principles can be relied upon in interpreting the contracts. These parties have been loath to enter into contracts governed by Russian law, because Russian corporate law is still in its infancy and simply does not have the specificity or long historical experience that English, German, and U.S. corporate law and courts have. Therefore, it is common for corporate contracts in Russia to specify that jurisdiction over disputes arising from their terms or performance are be decided in non-Russian courts or arbitral panels, corresponding to which nation's law the parties have chosen to govern the contract. Unfortunately, having these foreign judgments and arbitral awards enforced in Russia has been very complex, expensive, and unreliable.

68. *Id.* art. 147.1.
69. *Id.* art. 142.
70. *Id.* art. 149.

In 2013, the Russian Supreme Commercial Court (SCC) addressed this problem by releasing two Informational Letters (No. 156 dated February 26, 2013,[71] and No. 158 dated July 9, 2013).[72] All Russian commercial courts are bound by the SCC's recommendations in Informational Letters.

The SCC elaborated an approach that not only affirms contracting parties' discretion to define in their agreement the competent court as well as governing law applicable to future disputes, but also establishes certain limitations, some of which are intended to protect one party from the abuse of rights by another. The SCC established that an arbitral clause is valid and enforceable under the following circumstances:

a) At least one party to the contract is foreign, and the contract specifies that any disputes will be submitted to a Russian commercial court. If the arbitral clause does not specify the particular Russian commercial court, then a court is assigned pursuant to general procedural rules;[73]
b) The arbitral clause refers disputes to a court in the claimant/respondent's state of origin (e.g., an American party can bring suit in a U.S. court and a Russian party in a Russian court);[74] and
c) An arbitration clause shall survive when all of a creditor's rights under a contract are transferred from an assignor to an assignee under an assignment agreement.[75]

The SCC also emphasized that no mandatory procedural law provisions on jurisdiction and venue of the Russian commercial courts can be modified by a forum selection clause.[76] Practically, this means that if a contract concerns intellectual property issues, the parties may not choose the Russian Intellectual Property Court to hear their dispute because Russian procedural law mandates that this court is a "cassation" (second appeal) tribunal,[77] so it is not competent to be a court of first resort.

The SCC also reacted to delay tactics by debtors alleging non-competence of foreign state courts or arbitral institutes. A debtor's failure to object to a court's jurisdiction before its first statement in the process acts as a waiver of the right to challenge the court's jurisdiction thereafter.[78]

Additionally, the SCC clarified a number of procedural aspects that often arise when Russian commercial courts handle foreign judgment recognition and enforcement cases, including the following:

a) A party's consent to the jurisdiction of a foreign court does not mean, in and of itself, that it consents to be bound by the substantive laws of that court's state or country;[79]

71. Informational Letter, Prezidium Vysshego Arbitrazhnogo Suda Rossijskoj Federatsii [The Presidium of the Supreme Arbitration Court of the Russian Federation] No. 156 (Feb. 26, 2013) [hereinafter Informational Letter No. 156], *available at* http://www.arbitr.ru/as/pract/vas_info_letter/82122.html.

72. Informational Letter, Prezidium Vysshego Arbitrazhnogo Suda Rossijskoj Federatsii [The Presidium of the Supreme Arbitration Court of the Russian Federation] No. 158, July 9, 2013 [hereinafter Informational Letter No. 158], *available at* http://www.arbitr.ru/as/pract/vas_info_letter/89295.html.

73. *Id.*

74. *Id.* para. 2.

75. *Id.* para. 5.

76. *Id.* para. 4.

77. Arbitrazhnyj Processual'nyj Kodeks Rossiiskoi Federatsii (APK RF) [Arbitration Procedural Code] art. 274 (Russ.) *available at* http://www.consultant.ru/popular/apkrf/9_49.html#p3559.

78. Informational Letter No. 158, *supra* note 72, para. 7.

79. *Id.* para. 12.

b) Parties must prove the content and meaning of applicable foreign law (through affidavits, foreign legal treatises, expert witnesses, or the like). If one of the parties does not exercise its right to present such information or testimony, it forfeits the right to object to the other party's submissions of such evidence;[80]
c) Russian commercial courts do not recognize foreign courts' orders if they are de facto intended for recognition and enforcement of interim or temporary relief;[81]
d) Injunctions against the filing of a lawsuit or claim are non-enforceable in Russia;[82]
e) As it has always been, so-called "super-mandatory" provisions of Russian law always apply regardless of the applicable law agreed to by the parties,[83] and such provisions may operate to deny recognition and enforcement of a foreign judgment or award.

2. *Public Order Concept*

Due to past unreasonably broad usage of the concept of "violating the public order,"[84] the SCC released detailed recommendations on how and when Russian commercial courts may apply this concept to deny recognition and enforcement of an arbitral award. Russian commercial courts may utilize the public order concept if the award adopted by the arbitrator "could have been influenced by" one of the parties[85] or if the award violates the international law principle of sovereign equality of nations.[86] In all other instances, application of the "violation of public order" concept shall be decided on a case-to-case basis, taking into consideration its exceptional character.

Russian commercial courts may *not* refuse recognition and enforcement of a foreign award or judgment:

a) because the content of the applicable foreign law is different from Russian law;[87]
b) because the competent foreign court demands that the Russian party in the dispute must pay bail or other fees for appeal;[88]
c) because the agreement at issue was concluded by a foreign party in violation of Russian law requirements not shared by the governing law of the agreement;[89] or
d) so long as the award/decision was rendered in compliance with the principles of independence and impartiality of arbitrators/judges.[90]

80. *Id.* para. 18.
81. *Id.* para. 31.
82. *Id.* para. 32.
83. *Id.* para. 16.
84. This concept corresponds to the Anglo-American idea of "void as against public policy."
85. It is unclear where the burden of proof lies in an allegation that an arbitrator has been unduly influenced by a party. The mere existence of an impartiality risk has been held by the Moscow Commercial Arbitration Court to be sufficient to refuse recognition and enforcement of an arbitrator's award. *See* Novolipetsk Metallurgical Plant (NLMK) v. Nikolay Maximov and Maxi-Group JSC, Arbitrazˌney Sood Goroda Moskve [Moscow Arbitration Court] 2012, Case No. A40-26424/2011-83-201, *available at* http://us.practicallaw.com/7-521-2654. However, this decision was highly criticized and is unlikely to be a reliable precedent.
86. Informational Letter No. 156, *supra* note 71.
87. *Id.* para. 5.
88. *Id.* para. 7.
89. *Id.* para. 8.
90. *Id.* para. 11.

It should be noted that in the past six months, the Russian commercial courts have considered over one hundred cases regarding the issue of recognition and enforcement, and the SCC's recommendations have resulted in a significant reduction in Russian courts' refusal to recognize or enforce foreign court or arbitral decisions.

3. *Conflict of Laws*

Recent amendments also pertain to conflict of laws.[91] While most of these changes summarize case law approaches and only slightly adjust existing provisions of the Civil Code, some significant changes include:

a) A power of attorney shall be subject to the law of the country having the closest ties with the transaction, notwithstanding the choice of law by the parties;[92]
b) In the absence of a choice of law by the parties, a shareholders' agreement shall be subject to the laws of the company's place of incorporation;[93]
c) The law applicable to bad faith pre-contract negotiations shall be the law governing the concluded or contemplated contract;[94]
d) The law applicable to unjust enrichment shall be the law governing the contract's performance;[95] and
e) The victim is entitled to choose the law that applies to tort claims arising from damages caused by defective goods, works, or services, even if the parties' agreement provides otherwise.[96]

4. *Additional Expected Changes*

A radical reform of the judicial system in Russia is currently being considered by the Duma (the Russian Parliament). In essence, a merger is being contemplated between the two existing branches of lower courts—arbitrazh (commercial) courts and courts of general jurisdiction—with a consolidated Supreme Court above both branches.[97] A draft of the law had passed its second of third hearings as of December 1, 2013, and despite a highly contentious response from the legal community, might soon enter into full force, subject to a six-month transition period. If adopted, the law will result in significant changes for law practice and business in Russia.

---

91. Federalnыj Zakon ot 30.09.2013 N 260-FZ O Vnesenii Izmenenij v Chasty Tretyyu Grazhdanskogo Kodeksa Rossijskoj Federatsii [Federal Law of Sept. 30, 2013 N 260-FZ On Amendments to the Third Part of the Civil Code of the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation], 2013, No. 260 [hereinafter Federal Law of the Russian Federation No. 260-FZ], *available at* http://www.consultant.ru/document/cons_doc_LAW_152471/.

92. *Id.* art. 1217.1.

93. Civil Code, art. 1.

94. Federal Law of the Russian Federation No. 260-FZ, *supra* note 91.

95. *Id.* art. 1223.

96. *Id.* art. 1223.

97. Andrey Panov, *Will Judicial Reform Lead to Disappearance of Arbitrazh Courts?*, INT'L L. OFF. (Nov. 12, 2013), http://www.internationallawoffice.com/newsletters/detail.aspx?g=51bd0437-4a64-4202-a2a7-e1d60bbbb53e.

E. Intellectual Property

1. *Anti-Piracy Law*

Following its accession to the World Trade Organization and international agreements such as the U.S.-Russia Intellectual Property Rights Action Plan, the government created tools to fight the infringement of intellectual property rights, including the online piracy of copyrighted materials. A significant step was enactment of the "Anti-Piracy Law."[98] This law allows copyright holders to seek the blacklisting of websites that host pirated films and television shows[99] without contacting those responsible for uploading the video or obtaining a formal court decision on the legality of the content. Blacklisting now occurs through application for interim relief to the Moscow City Court, which has exclusive jurisdiction over such disputes.[100]

The most significant advantage of the Anti-Piracy Law is the speed and efficacy of its enforcement. The banning of a website with pirated content takes less than two weeks after filing with the Moscow City Court.[101] In a large majority of cases, website owners can voluntarily remove the pirated content before a mandatory IP or URL ban by Roskomnadzor.[102] A copyright holder may seek to impose civil liability on a website owner, hosting provider, and/or telecom provider as a remedy for the infringement.[103]

On November 1, 2013, the Moscow City Court published its first decision against one of the most prominent pirated content website hosts, http://rutor.org.[104] It is too soon to predict the Anti-Piracy Law's long-term effect on the market, but it is expected to be positive.

---

98. Federal'nyj Zakon Rossijskoj Federacii ot 2 Iûlâ 2013 g. N 187-FZ g. Moskva O Vnesenii izmenenij v Otdel'nye Zakonodatel'nye akty Rossijskoj Federacii po Voprosam Zasity Intellektual'nyh Prav v Informacionno-Telekommunikacionnyh Setâh [Federal Law of the Russian Federation of July 2, 2013 No. 187-FZ, On Amendments to Various Federal Laws Regarding Intellectual Property Rights Protection on the Internet], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2013, No. 187 [hereinafter Federal Law No. 187-FZ], *available at* http://www.rg.ru/2013/07/10/pravo-internet-dok.html.

99. At present, the Anti-Piracy Law applies only to films and television shows. *Id.* art. 2.

100. *Id.* Other city courts do not yet have jurisdiction over these types of disputes, but plaintiffs living outside Moscow may file claims to the Moscow City Court via internet through a special web page set up for this purpose. It is expected that after expansion of the Anti-Piracy Law to software, music, etc., jurisdiction over these disputes will be delegated (at least in part) to the new Intellectual Property Court described below in subsection 2.

101. *Id.* Roskomnadzor is the federal agency that, *inter alia*, oversees internet users' compliance with applicable Russian law.

102. For the list of films and internet resources covered by rulings of the Moscow City Court under the Anti-Piracy Law, *see Spisok Filymov i Resursov, Figuriruyushtih v Opredeleniyah Mosgorsuda, Vынесенныh v Ramkah Antipiratskogo Zakona* [*List of Films and Resources in the Definition of the Moscow City Court Made under the Anti-piracy Law*], Roskomnadzor (Aug. 26, 2013), http://rkn.gov.ru/news/rsoc/news21455.htm.

103. Federal Law No. 187-FZ, *supra* note 98, art. 4.

104. *Id.*

2. *Intellectual Property Court*

One of the milestones of intellectual property reform in 2013 was the creation of the specialized Intellectual Property Court.[105] The Intellectual Property Court considers all cases involving intellectual property issues in the first and/or cassation (second appeal) instance, depending on the category of the dispute.[106] For more efficient case consideration, the Intellectual Property Court was vested with a number of supplementary powers, namely:

a) the ability to address questions to special expert "councils" with special technical expertise;

b) exclusive authority to analyze, interpret, and set court practices in the sphere of intellectual property; and

c) rights to initiate legislation and the right to directly petition the Constitutional Court.

Since the beginning of this new court's operations, it has heard over 600 cases.[107] It is widely expected that the Intellectual Property Court will eliminate ambiguities and contradictions in IP case law and will increase the effectiveness of the system for protecting intellectual property rights.[108]

105. Federal'nyj Konstitucionnyj Zakon ot 06.12.2011 N 4-FKZ O Vnesenii Izmenenij v Federal'nyj Konstitucionnyj Zakon O Sudebnoj Sisteme Rossijskoj Federacii i Federal'nyj Konstitucionnyj Zakon Ob Arbitražnyh Sudah v Rossijskoj Federacii v Svâzi s Sozdaniem v Sisteme Arbitra_nyh Sudov Suda po Intellektual'nym Pravam [Federal Constitutional Law of the Russian Federation No. 4-FKZ, On Amendments to Various Federal Laws Regarding Constitution of the Intellectual Property Court], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation], 2011, No. 4, *available at* http://www.consultant.ru/document/cons_doc_LAW_122738/.

106. *Id.* art. 43.4.

107. A catalog of the cases considered in the Russian Commercial courts (including the Intellectual Property Court) is *available at* http://kad.arbitr.ru/.

108. *See* Stanislav Kozak, Intellektual'nye Prava Zasitit Special'nyj Sud [Special Court Will Consider Intellectual Property Cases], TPP-INFORM, (Sept. 13, 2013), http://www.tpp-inform.ru/security/3845.html.

THE YEAR IN REVIEW

AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

AMERICAN BAR ASSOCIATION
321 N. CLARK STREET
CHICAGO, ILLINOIS 60610